No. 90-681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BARBARA HAFER,

Petitioner,

v.

JAMES C. MELO, JR. and CARL GURLEY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, AND NATIONAL CONFERENCE OF STATE LEGISLATURES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

RICHARD RUDA
Chief Counsel
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for
Amici Curiae

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Pursuant to Rule 37.4 of the Rules of this Court, *amici* respectfully move for leave to file the accompanying brief *amicus curiae* in support of petitioner. Petitioner has consented to the filing of the brief. Respondents have refused consent.

Amici are organizations whose members include state, county and municipal governments and officials through-

out the United States. They have a vital interest in all aspects of the law, substantive and procedural, pertaining to civil rights actions brought against state and local government officials under 42 U.S.C. 1983.

While the substantive question of section 1983 liability presented in the petition is of great importance, *amici* respectfully submit that an important procedural question is necessarily comprehended therein: whether a government official may be sued under 42 U.S.C. 1983 for damages when the complaint fails to identify the capacity in which the official is sued. The court below addressed this question at length, *see* Pet. App. 15-17, and, we submit, reached an erroneous conclusion which—as that court acknowledges—is in direct conflict with the holdings of two other courts of appeals. *See id.* at 16 n.7.

Proper resolution of this question will serve the interest of judicial economy and lessen the intrusion of civil litigation into the processes of government by fostering the intended operation of the sovereign immunity doctrine. It will also ensure that pleadings in section 1983 cases serve their intended purpose—to "give the defendant fair notice of what the plaintiff's claim is." *See Conley v. Gibson*, 355 U.S. 41, 47 (1957).

Because of the importance of this issue to all state and local governments and officials, *amici* seek leave to file this brief to assist the Court in the resolution of this case.

Respectfully submitted,

RICHARD RUDA
Chief Counsel
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for
Amici Curiae

April 11, 1991

QUESTION PRESENTED

Amici will address the following question:

Whether a government official may be sued under 42 U.S.C. 1983 for damages when the complaint fails to identify the capacity, official or personal, in which the official is sued.

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INTEREST OF THE *AMICI CURIAE*

The interest of the *amici* is set forth in the motion that precedes this brief.

RULES INVOLVED

Federal Rule of Civil Procedure 8(a).

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Federal Rule of Civil Procedure 9(a).

Rule 9. Pleading Special Matters

(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party desiring to raise the issue shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

STATEMENT

On January 16, 1989, Barbara Hafer was sworn in as Auditor General of Pennsylvania. Pet. App. 37. On February 1, 1989, eighteen employees in the Office of the Auditor General, including eight of the respondents, were terminated. *Id.* On February 21 the eight other respondents, also employees in the Office of the Auditor General,

were terminated. *Id.* During April and May the 16 respondents commenced 11 different section 1983 actions arising out of these terminations. *Id.* at 6-7.

Hafer is named as a defendant in each of these 11 actions. Pet. App. 37 n.2. Ten of the actions were each filed on behalf of a single plaintiff. In none of these ten actions do the complaints identify the capacity, official or personal, in which Hafer is sued. *See* Pet. App. 16; *see also, e.g.*, J.A. 7-19, 26-29, 33-36. The eleventh and last complaint to be filed was filed jointly by the six remaining plaintiffs. Pet. App. 15. Only in this final complaint was reference made to the fact that these six employees seek certain relief from Hafer in her official capacity and other relief from her in her personal capacity. *See id.*; J.A. 41-55.

On June 14, 1989, Hafer answered the complaints. Pet. App. 7. On July 18, 1989, the district court consolidated the eleven separate cases into two actions. *Id.* at 7, 37 n.2. In one of the consolidated actions, the "*Melo*" action, the eight plaintiffs are the employees who were terminated on February 1, 1989. *See* Pet. App. 36-37. The eight plaintiffs in the other consolidated action, the "*Gurley*" action, are the employees who were terminated on February 21, 1989. *See id.*

Each of the eight plaintiffs in the *Melo* action seeks to recover $2 million in compensatory damages, $1.5 million in punitive damages, and attorneys' fees. Pet. App. 6-7. The eight plaintiffs in the *Gurley* action each seek to recover $500,000 in compensatory damages and $500,000 in punitive damages. *Id.* at 7. Six of the *Gurley* plaintiffs also seek injunctive relief consisting of reinstatement without back pay. *Id.*

On August 9, 1989, Hafer filed a consolidated dispositive motion in the *Melo* and *Gurley* actions. Pet. App. 8. On September 28, 1989, the district court granted Hafer's dispositive motion. *Id.* at 9, 36-40.[1] The district court

[1] At the time Hafer's motion was granted discovery had only recently commenced. *See* Pet. App. 11-13.

held that the terminated employees' actions against Hafer were barred because "Hafer's power to cause the terminations derived solely from her authority as a state official", *id.* at 40, and a section 1983 action does "not lie against a State or its officials acting in their official capacity," *id.* at 37 (citing *Will v. Michigan Department of State Police*, 109 S. Ct. 2304, 2312 (1989)).

Treating the district court's orders as granting a motion to dismiss, the court of appeals vacated the judgment of the district court in Hafer's favor. *See* Pet. App. 13, 32. Before reaching the issue of whether Hafer could be sued for terminating the plaintiffs, the court extensively analyzed the 11 complaints. *See id.* at 15-17. The court acknowledged that "[a] defendant being sued in his or her personal capacity should be given adequate notice that his or her personal assets are at stake." *Id.* at 16 n.7. The court also conceded that "[i]t is obviously preferable for the plaintiff to be specific in the first instance to avoid any ambiguity." *Id.* The court of appeals nonetheless held that it is irrelevant that ten of the eleven complaints do not identify the capacity in which Hafer is sued. *See id.* at 16.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented, while a pleading question, is of vital importance to the courts, public officials, and public employers. In *Kentucky v. Graham*, 473 U.S. 159, 165-68 (1985), this Court, responding to confusion among attorneys and the lower courts, meticulously delineated the distinctions between personal and official capacity civil rights actions against state officials. The court below applied a pleading rule which obliterates those distinctions.

Even though the federal civil rules require a plaintiff to plead capacity when necessary to establish jurisdiction, *see* Fed. R. Civ. P. 8(a)(1), 9(a), the court of appeals

held that a plaintiff is not required to identify in the complaint the capacity in which a government official is sued for damages under section 1983. *See* Pet. App. 15-17. *See also Melton v. City of Oklahoma City*, 879 F.2d 706, 726-27 & n.29 (10th Cir.), *reh'g granted in part on other grounds*, 888 F.2d 724 (10th Cir. 1989) (en banc); *Conner v. Reinhard*, 847 F.2d 384, 394 n.8 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988); *Lundgren v. McDaniel*, 814 F.2d 600, 603-604 (11th Cir. 1987). In so holding the court below expressly disagreed with other courts of appeals which "require the complaint to specifically identify the capacity in which a defendant is being sued" in a section 1983 action. Pet. App. 16 n.7 (citing *Wells v. Brown*, 891 F.2d 591, 593 (6th Cir. 1989); *Nix v. Norman*, 879 F.2d 429, 431 (8th Cir. 1989)).

Amici respectfully submit that the court below was in error. The federal civil rules eliminated the unnecessary burdens and pitfalls of common law pleading. *See Conley v. Gibson*, 355 U.S. 41, 47 (1957). The rules nonetheless require the complaint to set forth the grounds of the court's jurisdiction, *see* Fed. R. Civ. P. 8(a)(1), and to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests," *see Conley v. Gibson*, 355 U.S. at 47. By its holding, the court of appeals eviscerated those requirements in section 1983 cases. The rule applied by the court below and other courts of appeals undermines the operation of the immunity doctrine of the Eleventh Amendment, unreasonably burdens public officials and public employers in their defense of civil rights actions, and unfairly advantages section 1983 plaintiffs. The holding of the court below should be reversed and the case remanded so that the respondents may, if they deem it appropriate, move to amend their complaints. *See* Fed. R. Civ. P. 15(a).[2]

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[2] *Amici* express no view on the question whether a state official may be liable in her personal capacity under section 1983 for terminating employees in her department.

ARGUMENT

I. THE FEDERAL RULES OF CIVIL PROCEDURE REQUIRE A PLAINTIFF TO PLEAD THE BASIS OF THE COURT'S JURISDICTION AFFIRMATIVELY AND DISTINCTLY.

Fed. R. Civ. P. 8(a)(1) requires that the complaint allege the basis of the court's jurisdiction "affirmatively and distinctly"; jurisdiction "cannot 'be established . . . by mere inference.'" 5 C. Wright & A. Miller, *Federal Practice & Procedure* 93-94 & nn. 13-14 (2d ed. 1990) (quoting *Thomas v. Board of Trustees*, 195 U.S. 207, 218 (1904)). *See also McNutt v. GMAC*, 298 U.S. 178, 189 (1936); James, *The Objective and Function of the Complaint*, 14 Vand. L. Rev. 899, 901 (1961). The requirement that jurisdiction be alleged affirmatively in the complaint is reiterated in Rule 9(a). This rule dictates that where "required to show the jurisdiction of the court," the capacity in which a government official is sued must be pleaded with specificity. *See* Fed. R. Civ. P. 9(a); *Wells v. Brown*, 891 F.2d at 593. *See generally Moore v. Mitchell*, 281 U.S. 18 (1930).

II. THE CAPACITY IN WHICH A GOVERNMENT OFFICIAL IS SUED IN A SECTION 1983 ACTION IS JURISDICTIONAL AND MUST BE PLEADED WITH SPECIFICITY.

The Eleventh Amendment deprives the federal courts of jurisdiction to entertain civil rights damages actions against state officials in their official capacity. *See Will v. Michigan Department of State Police*, 109 S.Ct. 2304, 2311-12 (1989); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98-99 & n.8 (1984) (citing *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 467 (1945)). Because the capacity in which a state official is sued is jurisdictional, capacity must be affirmatively and distinctly pleaded in the complaint and is not to be deduced by mere inference. *See* Fed. R. Civ.

P. 8(a)(1), 9(a); *Thomas v. Board of Trustees*, 195 U.S. at 218. Moreover, specific allegations of capacity are essential to give the defendant fair notice of the claim and the grounds upon which it rests because the fundamental nature of the case and the source of recovery depend upon the capacity in which the government official is sued. *See Kentucky v. Graham*, 473 U.S. at 165-68.

The court of appeals has nonetheless relieved section 1983 plaintiffs of the obligation to plead capacity at all. If left undisturbed, its holding will confirm the existence in some circuits of a rule that section 1983 plaintiffs do not have to meet the minimal pleading requirements of Fed. R. Civ. P. 8(a)(1) and 9(a). *See* Pet. App. 16 (citing *Conner v. Reinhard*, 847 F.2d at 394 n.8, *Melton v. City of Oklahoma City*, 879 F.2d at 727 n.32; *Lundgren v. McDaniel*, 814 F.2d at 604).

The court below and other courts of appeals which have reached this result base their holdings on the following *dicta* in *Kentucky v. Graham*:

> In many cases, the complaint will not clearly specify whether officials are sued personally, in their official capacity, or both. 'The course of proceedings' in such cases typically will indicate the nature of the liability sought to be imposed. *Brandon v. Holt*, 469 U.S. 464, 469 (1985).

473 U.S. at 167 n.14. *See* Pet. App. 15; *Conner*, 847 F.2d at 394 n.8; *Melton*, 879 F.2d at 726; *Lundgren*, 814 F.2d at 604. *Amici* respectfully submit that these lower courts have improperly construed the *Graham dicta*.[3] *Amici* further submit that the case from which the

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[3] Some courts have interpreted the *Graham dicta* as creating a rule which relieves section 1983 plaintiffs of any obligation to plead capacity and shifts the plaintiffs' burden to the courts. Under this view, when the plaintiff elects not to plead capacity *the court* "must" analyze the "course of proceedings" to resolve the capacity issue. *See Melton*, 879 F.2d at 726. *See also Lundgren*, 814 F.2d at 604.

Graham dicta were drawn, *Brandon v. Holt*, had an unusual procedural history.

The plaintiffs in *Brandon* filed their complaint before this Court's decision in *Monell v. Department of Social Services* changed the law by establishing that municipal officials are subject to suit in their official capacity. *See* 436 U.S. 658, 690-91 (1978). Although the *Brandon* complaint did not state that the Memphis Director of Police was sued in his official capacity, the extensive record developed after the *Monell* decision "plainly identif[ied]" the plaintiffs' claim for damages as one asserted against the Director in his official capacity. *See* 469 U.S. at 471; *see also id.* at 469-71 & nn. 12-18. "Given this state of the record," the *Brandon* Court held that "at this late stage of the proceedings, petitioners are entitled to amend their pleadings to conform to the proof and to the District Court's findings of fact." *Id.* at 471 & n.19 (citing Fed. R. Civ. P. 15(b)); *see also Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 221 n.6 (1985). In this case there has been no change in the law, nor does the incipient record contain a "plain identification" of the capacity in which Hafer has been sued. The *Brandon* analysis is accordingly inapplicable.

The rule applied by the court below is particularly destructive in the section 1983 context because it undermines the sovereign immunity doctrine, seriously disadvantages government officials and attorneys in the preparation of a defense, and unfairly advantages section 1983 plaintiffs.[4]

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[4] Some of the courts which have declined to impose such a rule —including the court below—concede that specific pleading of capacity is "preferable". *See* Pet. App. 16 n.7 ("It is obviously preferable for the plaintiff to be specific in the first instance to avoid any ambiguity."); *Duckworth v. Franzen*, 780 F.2d 645, 650 (7th Cir. 1985) ("urg[ing] counsel for civil rights plaintiffs when they are suing a state officer in his individual capacity to say so plainly"), *cert. denied*, 479 U.S. 816 (1986).

A. The Holding of the Court Below Undermines the Operation of The Sovereign Immunity Doctrine.

The social costs of civil litigation against state and local government officials, "not only to the defendant officials, but to society as a whole," are well known. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 & n.22 (1982) (citing Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 S.Ct. Rev. 281). The sovereign immunity doctrine places distinct limits on this class of litigation. Where the doctrine is applicable—as, for example, in section 1983 damages suits against state officials for actions taken in their official capacity, *see Will*, 109 S.Ct. at 2311-12—it is intended to terminate litigation at the earliest, least intrusive, and least expensive stage. "[T]he essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). Consequently, "an absolute immunity . . . is effectively lost" if a case is erroneously permitted to go beyond the pleading stage. *See id.* at 526.

In *Harlow v. Fitzgerald* the Court reiterated that the firm application of the federal civil rules at the pleading stage is essential to the intended operation of an immunity.[5]

> 'Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful

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[5] Because of the burgeoning volume of section 1983 actions the courts of appeals have uniformly "tightened the application" of the factual pleading requirements of Rule 8 in this class of cases. *See, e.g., Arnold v. Board of Education of Escambia County*, 880 F.2d 305, 309 (11th Cir. 1989); *Frazier v. SEPTA*, 785 F.2d 65, 67-68 (3d Cir. 1986) (Adams, C.J.); *Elliot v. Perez*, 751 F.2d 1472, 1479 & n.20 (5th Cir. 1985); *Hobson v. Wilson*, 737 F.2d 1, 29-30 & n.87 (D.C. Cir. 1984) (collecting cases), *cert. denied*, 470 U.S. 1084 (1985). *Cf. Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 149-150 (1984) (declining to relax Rule 8 pleading requirements in Title VII actions).

> pleading. Unless the complaint states a compensable claim for relief, it should not survive a motion to dismiss. . . . [P]laintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.'

457 U.S. at 808 (quoting *Butz v. Economou*, 438 U.S. 478, 507-508 (1978)). By relieving section 1983 plaintiffs of the obligation to plead jurisdiction affirmatively and distinctly, the holding of the court below plainly subverts the immunity doctrine.

The untoward consequences of this holding, both for the judiciary and for government officials, is illustrated by *Meadows v. Indiana*, 854 F.2d 1068 (7th Cir. 1988). Former members of the Indiana National Guard brought a section 1983 damages action against the State and numerous state officials arising out of the termination of their Guard memberships. The district court found jurisdiction and rendered a judgment on the merits in favor of the defendants. *See id.* at 1068. Almost a year later, during oral argument in the court of appeals, plaintiffs' counsel readily conceded that the plaintiffs had no basis for a personal capacity suit against the state officials. *See id.* at 1069. The court of appeals thereupon vacated the judgment in favor of the defendants and remanded the case for dismissal on Eleventh Amendment grounds. *See id.* at 1070. Had the plaintiffs in *Meadows* specifically pleaded the capacity in which they had sued the government officials, this disposition would have been made on a motion to dismiss filed early on during the district court proceedings rather than years later in the court of appeals.

B. The Holding of the Court Below Impedes Defendant Officials in the Preparation of Their Defense.

The federal civil rules require the complaint to contain a statement of the claim that is sufficient to enable the defendant to prepare a defense. *See* discussion *supra* at

5-6. The holding of the court below, however, impedes the preparation of a defense by government officials since it interferes with the invariably urgent task of designating defense counsel.

In numerous States government attorneys are statutorily obligated to defend officials sued in their official capacity.[6] Concomitantly, the government may decline to defend an official sued in his or her personal capacity, or may be precluded from doing so.[7] Critical decisions about

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[6] *See, e.g.*, Cal. Gov't Code sec. 26529 (Deering 1991) ("The county counsel shall defend . . . all civil actions and proceedings in which the county or any of its officers is concerned or is a party in his or her official capacity."); Del. Code Ann., tit. 29, sec. 2504(3) (1983) (attorney general "to represent as counsel in all proceedings or actions which may be brought . . . against them in their official capacity in any court . . . all officers . . . of state government"); Idaho Code Ann. sec. 67-1401.1 (1989) (attorney general to "defend all causes to which the state or any officer thereof, in his official capacity, is a party"), *construed in Parsons v. Beebe*, 116 Idaho 551, 777 P.2d 1224, 1226 (1989); Ill. Ann. Stat. ch. 34, para. 3-9005(4) (Smith-Hurd 1990) (State's attorney "[t]o defend all actions and proceedings brought against . . . any county or State officer, in his official capacity, within his county"), *quoted in Kolar v. County of Sangamon*, 756 F.2d 564, 565 (7th Cir. 1985); Iowa Code Ann. sec. 331.756.6 (West 1983) ("The county attorney shall . . . defend all actions and proceedings in which a county officer, in the officer's official capacity, or the county is interested or a party."); Miss. Code Ann. sec. 7-5-39 (1972) (attorney general to "act as counsel for any of the state officers in suits brought . . . against them in their official capacity"); R.I. Gen. Laws Ann. sec. 42-9-6 (1988) (attorney general to defend state officers "in all suits and proceedings which may be brought against them in their official capacity"); Utah Code Ann. sec. 67-5-1 (1990) (attorney general to "defend all causes to which" any state officer "in an official capacity is a party"), *construed in Hearn v. Utah Liquor Control Comm'n*, 548 P.2d 242, 245 (Utah 1976); Wash. Rev. Code Ann. sec. 43.10.030 (1983) (attorney general "shall . . : defend actions and proceedings against any state officer or employee acting in his official capacity").

[7] *See, e.g., Kentucky v. Graham*, 473 U.S. at 162 (State declines to defend official); *Hearn v. Utah Liquor Control Commission*, 548 P.2d at 245 (State precluded from defending official). *Cf.* Nev.

the representation of defendant officials must thus be made immediately after the summons and complaint are served. This decision-making process is needlessly obstructed when plaintiffs are relieved of the obligation to identify in the complaint the capacity in which the official is sued.

C. Requiring the Complaint to Identify the Capacity in Which Government Officials are Sued Does Not Unreasonably Burden Plaintiffs in Section 1983 Actions.

Vital purposes of state governance and judicial administration are served when capacity is required to be pleaded distinctly and affirmatively. Yet, as this Court has recognized, requiring such specific pleading does not burden a civil rights plaintiff. It would, the Court said with express reference to section 1983 litigation,

> verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant, and types of relief available. Most importantly, of course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action.

Bounds v. Smith, 430 U.S. 817, 825 (1977).[8] As Justice Holmes observed, "the party who brings a suit is master to decide what law he will rely upon." *The Fair v. Kohler Die and Specialty Co.*, 228 U.S. 22, 25 (1913). In view of that rule and the provisions for amendment

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Rev. Stat. sec. 41.0339 (1979) (attorney general to investigate civil action against state official within 15 days after service of summons and complaint to determine whether State will undertake defense); S.C. Code Ann. sec. 1-7-60 (Law. Co-op. 1986) (attorney general shall investigate prior to undertaking defense of state official).

[8] "[S]uch preliminary research . . . is no less vital" for a *pro se* section 1983 plaintiff. *Bounds*, 430 U.S. at 825-26.

of pleadings, *see* Fed. R. Civ. P. 15, there is no fathomable justification for excusing civil rights plaintiffs from pleading with specificity the capacity in which they are suing government officials. In short, "[i]t is certainly reasonable to [require] that all [section 1983] plaintiffs . . . alert party defendants that they may be individually responsible in damages" by identifying in the complaint the capacity, official or personal, in which they are sued. *See Wells v. Brown*, 891 F.2d at 594.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RICHARD RUDA
Chief Counsel
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for
Amici Curiae

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